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(1)

No. _____

IN THE

Supreme Court of the United States

PATRICIA KONARSKI, ET AL.,

Petitioners,

-vs-

CITY OF TUCSON, ET AL.,

Respondents.

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FRANK KONARSKI, ET AL.,

Petitioners,

-vs-

MARY JEAN RACITI, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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He took our money and deceived us, and passed away.

Others and we strongly believe that some individuals of the City of Tucson, through their bad influence—discrimination, prejudice, hate crimes, frames, extortion, etc.—caused some of the attorneys listed above to take our money and deceive us. That's why we are appealing to the Supreme Court.

QUESTIONS PRESENTED

1. Whether the Code of Federal Regulations affords Petitioners and those similarly situated due process protections, including a suspension-cause hearing, particularly in consideration of 24 C.F.R. 24.610, et seq., as such regulations relate to the governance of the federal Section 8 Housing program?

2. Whether an extraordinarily methodical and systematic clandestine public corruption scheme, as recently revealed by government whistleblowers, aimed at causing multi-faceted harm and destroying Petitioners—a family and their interstate commerce business—should be considered as part of what is today's "certain instances" that "'are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of *res judicata*..."?

PARTIES TO THE PROCEEDING

In accordance with Rule 14.1, the following list below identifies the parties represented here.

In reference to *Patricia Konarski, et al., v. City of Tucson, et al.* ("Section 8 Case"), Petitioners here and in the consolidated Ninth Circuit Court of Appeals are Patricia Konarski, John F. Konarski and Frank Edward Konarski (Jr.).

Respondents are the City of Tucson; Julianne Hughes, City of Tucson Assistant Attorney; Emily Nottingham, City of Tucson Community Services Director; and Peggy Morales, City of Tucson Housing Administrator.

There are no corporations of which to report per Rule 29.6.

In reference to *Frank Konarski, et al., v. Mary Jean Raciti, et al.* ("Whistleblower Case"), Petitioners here and in the consolidated Ninth Circuit Court of Appeals are Frank J. Konarski and Gabriela Konarski, individually, as husband and wife, and as owners of FGPJ Apartments & Development (a dba); Patricia Konarski, a single woman and as an owner of FGPJ Apartments & Development (a dba); John F. Konarski, a single man and as an owner of FGPJ Apartments & Development (a dba); and Frank E. Konarski, a single man and as an owner of FGPJ Apartments & Development (a dba).

Respondents are Mary Jean (AKA, "MJ") Raciti, as a City of Tucson senior assistant city attorney and, individually; Julianne K. Hughes, as a City of Tucson senior assistant city attorney, individual capacity, and in her marital community and interest with Graeme Hughes; Viola Romero-Wright, as a City of Tucson senior assistant city

attorney and individually, in her marital community and interest with Robert Halsey Wright; William F. Mills, as a City of Tucson senior assistant city attorney, and individually in his marital community and interest with Edna Gayle Eskay; Cecilia C. Cruz as the City of Tucson Department of Neighborhood Resources Manager and Head of Housing Complaint Inspections, individual capacity, and in her marital community and interest with Salomon R. Baldenegro; Richard (AKA, "Rick") Saldate, as the City of Tucson Department of Neighborhood Resources Supervisory Inspector, individual capacity, and in his marital community and interest with Inez Saldate; Emily Nottingham, as the City of Tucson Community Services Department Director, and individually, with her marital community and interest with John Doe; Michael Spriesterbach, as a City of Tucson senior assistant attorney and individually, in his marital community and interest with Jane Doe; Paul M. Swift, as the City of Tucson Department of Neighborhood Resources Director, and individually with his marital community and interest with Anna C. Swift; Peggy Morales, as the City of Tucson Section 8 Housing Administrator, and individually in her marital community and interest with John Doe; Raymond F. Camacho in his official capacity as a City of Tucson Department of Neighborhood Resources Inspector, individual capacity, and in his marital community and interest with Brenda O. Camacho; Martin Romero, as a City of Tucson Department of Neighborhood Resources Inspector, and individually in his marital community and interest with Jane Doe; City of Tucson, a body politic; XYZ Corporations 1-20; ABC Partnerships 1-20; and Does 1-20.

With regard to corporate Respondents, XYZ Corporations 1-20, these were fictitiously named since their identities were not known at the time of the filing of the Whistleblower Case, and have yet to be determined.

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Petitioners respectfully petition for a writ of certiorari to review the consolidated Section 8 Case and Whistleblower Case judgment of the Ninth Circuit Court of Appeals ("Court of Appeals") in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 1-4) is reported at 2008 U.S. App. LEXIS 17897 (9th Cir. 2008). The order of the Court of Appeals, dated October 2, 2008 (App. 20-21), denying Petitioners' petition for panel rehearing and petition for en banc review.

The order of the District Court for Arizona ("District Court") (App. 5-14), dismissing the Section 8 Case, filed September 29, 2006.

The order of the District Court, dismissing the Whistleblower Case, filed May 2, 2007 (App. 15-19).

JURISDICTION

Upon having consolidated both *Patricia Konarski, et al., v. City of Tucson, et al.* ("Section 8 Case") and *Frank Konarski, et al., v. Mary Jean Raciti, et al.* ("Whistleblower Case"), and, correspondingly, held a consolidated oral hearing on August 13, 2008, the Court of Appeals filed its Opinion on August 18, 2008, denying Petitioners the appellate relief they sought under 28 U.S.C. § 1291. App. 1-4.

On September 2, 2008, Petitioners timely filed a Petition for Panel Rehearing and En Banc Review.

On October 2, 2008, the Court of Appeals filed its Order, denying both the petition for panel

rehearing and petition for en banc review. App. 20-21.

On January 7, 2009, the Clerk of this Court informed Petitioners to perfect their petition for writ certiorari.

Under 28 U.S.C. § 1254(1), Petitioners now timely submit this instant petition for writ of certiorari, having originally paid the docket fee on December 31, 2008.

CODE OF FEDERAL REGULATIONS INVOLVED

The relevant Code of Federal Regulations is set forth in Appendix E-G, *infra*.

STATEMENT OF THE SECTION 8 CASE

The Code of Federal Regulations exists to regulate various federal programs, including, in particular, the federal Section 8 Housing program that was established under the U.S. Housing Act of 1937 (42 U.S.C. § 1437). These federal regulations, particularly 24 C.F.R. 24.610, et seq., cover every aspect of the Section 8 Housing program, from the general administration of the program to the specific matter of regulating the suspensions of rental property owners from participation in such a federal housing program, the latter of which is the crux of the Section 8 Case petitioned for review to this Court.

24 C.F.R. 24.760 requires a hearing to be held, among other procedural processes to take place, for a property owner who is suspended for more than 18 months from the program. As such, courts of

different circuits across the nation have determined that with such federal regulations come due process protections; however, the Court of Appeals has disagreed in the Section 8 Case.

Specifically, the Court of Appeals affirmed the dismissal of the Section 8 Case of Petitioners Patricia, John F. and Frank E. Konarski by relying on a legal ruling of another case—i.e., there is no independent right to participate in the Section 8 Housing program—as a basis upon which to then arbitrarily determine, in contravention of the jurisprudence of other circuit courts across the nation, that the Code of Federal Regulations, including particularly 24 C.F.R. 24.610, et seq., as it relates to the Section 8 Housing program, does not afford such Petitioners or others similarly seeking participation in a federally regulated program any due process protections, including a suspension-cause hearing.

Petitioners Patricia, John F. and Frank E. Konarski have argued that whether they have a "right" to Section 8 or not does not have any relevance as to whether the Code of Federal Regulations applies to them.

A. Case Facts

Petitioners Patricia, John F. and Frank E. Konarski filed their instant Section 8 Case in 2005 against City Respondents in the capacity that such Respondents acted as the local public housing authority of the federal Section 8 Housing program when, after such Petitioners first became property owners in 2003, City Respondents barred them for more than 18 months from renting to prospective Section 8 tenants who desired to live in their housing, barring them without a suspension-cause

hearing and other procedural considerations accorded property owners under 24 C.F.R. 24.610, et seq., including specifically 24 C.F.R. 24.760.

In referencing a 2001 Title VII employment discrimination action that Frank J. Konarski (*Sr.*), through an attorney, immediately brought forth, without first waiting for his own suspension to surpass 18 months, to challenge his own suspension effected through a March 2001 decision to withhold him from renting his apartments to prospective Section 8 tenants, even though, to this day, he and his wife, Gabriela, have been qualified to rent to an existing Section 8 tenant for about the past 15 years, and the process of renting to new Section 8 tenants is the same as that of the lease renewal process of this existing, 15-year-and-going Section 8 tenancy[1]—a

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[1] Without any trial, the Court of Appeals made an erroneous factual finding as to the 2001 District Court matter, and that was that Frank J. Konarski "had one or more disputes that apparently had racial overtones with tenants" that led to his not being able to rent to new Section 8 tenants. Petitioners nor was their then-counsel under the impression that the Court of Appeals would undertake the function of making such an unproven allegation a factual determination at the appellate level without a trial, altogether of which would nevertheless have no relevance to the three Konarskis—Patricia, John, and Frank E.—now pursuing the instant Section 8 Case as property owners since 2003. However, in the interests of accuracy—if the Court of Appeals would maintain the position of trying this issue—Petitioners offered to furnish to the Court of Appeals City e-mails, among other evidence, that uncover the City of Tucson's Section 8 administrator's premeditated intention of disallowing Frank J. Konarski from renting to new Section 8 tenants: "What I don't want to do is to take an administrative action to bar him [Frank J.], and then not have support legally to see this through to a positive resolution for the City. He has 'won' one case against the City, and we dare not let him gain

matter in which it was determined Section 8 did not create an employer-employee relationship and, in any event, a matter in which Petitioners Patricia, John, and Frank E. Konarski did not appear as landlords or those with any property interest—what the District Court and Court of Appeals found relevant from such a case to apply to the instant Section 8 Case was that property owners cannot claim an independent right to participate in the Section 8 Housing program. App. 3; *see* App. 12.

However, neither the District Court nor did the Court of Appeals ever cite to any authority suggesting that this lack of any "right" to participate in Section 8 relieves City Respondents from having to follow the Code of Federal Regulations as it pertains to its responsibility to fairly administer the federally funded Section 8 program to ***all*** property owners within City Respondents' jurisdiction.

In fact, without citing to any authority, after oral argument on August 13, 2008, the Court of Appeals held that "[Petitioners Patricia, John F. and Frank E. Konarski] assert[ed] that they could only be suspended from Section 8 program for 18 months **is <u>dependent</u> upon their having a right to participate in the program...."** App. 4. (Emphasis added.) With its determination that there is no right to participate in the Section 8 Housing program, the Court of Appeals found that Petitioners Patricia, John F. and Frank E. Konarski were not entitled to

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more confidence/arrogance in the legal arena." City attorney Julianne Hughes' said she would "be able to devote more time to trying to find a way to justify the department removing Mr. K[onarski]. from consideration." Thus, "racial overtones" is an offensive, unproven allegation that the Court of Appeals should have removed.

the federally-codified due process protection of their suspension from participation being limited to not more than 18 months without the initiation of due process hearings under 24 C.F.R. 24.760(b).

Petitioners Patricia, John F. and Frank E. Konarski, through their petition for panel rehearing and petition for en banc review filed on September 2, 2008, argued that the latter holding of the Court of Appeals was not only defiant of the Code of Federal Regulations, but also without the support of any authority, and actually in contravention of the jurisprudence of courts of other circuits.

On October 2, 2008, the Court of Appeals declined to rehear its ruling in light of the foregoing.

B. Federal Jurisdiction in the Court of First Instance

The court of original instance, District Court, had jurisdiction under 28 U.S.C. § 1331.

C. Reasons for Granting Petition

I. The Court of Appeals' Opinion Fully Resolved an Issue, Which is Appropriate for Certiorari, and Its Resolution is Inconsistent With Decisions of This Court and Other Circuit Courts

This case presents this Court with a matter of exceptional importance: The division in the interpretation and application of the Code of Federal Regulations that acts as the essential framework of the administration of federal programs—in this case, the Section 8 Housing program, a national program that affects all fifty states.

Despite the clarity of the Code of Federal Regulations, particularly 24 C.F.R. 24.610, et seq., including specifically 24 C.F.R. 24.760, the Court of Appeals has defied such a code as it relates to the

due process protections found therein and, in the process, has rendered a decision that is inconsistent with the jurisprudence of this Court and courts of other circuits.

Specifically, the Court of Appeals' holding—that because "[Petitioners Patricia, John F. and Frank E. Konarski] assert[ed] that they could only be suspended from Section 8 program for 18 months **is dependent upon their having a right to participate in the program...**"—proves not only to be unsupported by the law, but actually in direct conflict with the law of other courts of different circuits and this Court, as the code, itself, speaks of no prerequisite right to participate in the Section 8 program nor has any other court adjudged that one must have a right to such a federal program for the legal protections of the code to take effect. App. 4. (Emphasis added). For example, a court in the Fifth Circuit has actually applied 24 C.F.R. 24.700 to the "due process" found within the Code of Federal Regulations to property owners the government sought to suspend. *See Rogers v. United States,* 187 F. Supp.2d 626, 632 (N.D. Miss. 2001); affirmed by this Court in *Rogers v. United States/Human Urban Dev.*, 58 Fed. Appx. 595 (US 2003) (without published opinion).

In addition to the Fifth Circuit, the United States Court of Appeals for the Sixth Circuit found, in *Buckeye Terminix Co. v. U.S. Dep't of Housing & Urban Dev.*, 900 F.2d 259 *2 (6th Cir. 1990), that a business that did not have a contract with the U.S. Department of Housing and Urban Development or its public housing authorities, but *merely* an "interest in remaining" qualified for participation in a federal housing program, was legally afforded "a right to be

represented by counsel and present all relevant evidence at a hearing" under the 24 C.F.R. 24.700, et seq. Yet, in the case of Petitioners Patricia, John F. and Frank E. Konarski, *sub judice*—in which not only did Petitioners have a business interest in participation in the Section 8 Housing program, but also prospective Section 8 tenants were effectively choosing to use their "free-choice" Section 8 housing vouchers at Petitioners' apartments in selecting them as their landlords, consequently making Petitioners' privilege to participate in the program a right to accept the business they receive—they have been denied all due process protections accorded under 24 C.F.R. 24.700, et seq., including a hearing, to the present day—now approximately seven years, even though "a **prompt** post-deprivation hearing" should have been accorded them at the very least. *Buckeye*, 900 F.2d 259 *13 (Emphasis added.) *See also Housing Study Group v. Kemp*, 739 F. Supp. 633 (D.C. May 16, 1990) (citing *Buckeye, supra*).

This is where the injustice lies: If Section 8 participation is determined by the Section 8 voucher holder, and City Respondents' role is to ensure safe and sanitary living conditions to those qualified under the Section 8 Housing program, where is the government's—in this case City Respondents'—authority to suspend the application of the Code of Federal Regulations as it pertains to any property owner in Tucson or any other locality? Quite bluntly, this authority does not exist.

Put differently, since the Section 8 voucher recipient determines where they live—what housing of a property owner they want, the City Respondents' job is to administer this program by: (1) ensuring that the property is safe and secure; and (2) making

sure that the property owner gets compensated.

To this end, 24 C.F.R. 24.610, et seq., was established to provide a framework for the proper administration of Section 8 housing.

Specifically, 24 C.F.R. 24.760 says that City Respondents cannot bar any property owner for more than 18 months from renting to prospective Section 8 tenants who want to live in that property owner's apartment.

If the Code of Federal Regulations were to only be applied to property owners who have a "right" to Section 8, and in consideration of the Court of Appeals' establishment that no property owner actually has the "right" to Section 8, then, logically, the Code would protect no property holder, rendering such a code impotent as to its regulatory purpose and generally useless as to its existence.

Undeniably, this Section 8 Case of Federal Code Regulations was not an issue before the court in the 2001 Title VII action the Court of Appeals relied upon to find that Petitioners Patricia, John F. and Frank E. Konarski had no due process recourse, having no "right" to the Section 8 Housing program. App. 3. In accordance with *Allen v. McCurry,* 449 U.S. 90, 94 (1980), since Petitioners Patricia, John F. and Frank E. Konarski had no ability to know that the City, at the outset of the Title VII suit, would continue its bar against Frank J. Konarski, and actually apply the bar to them all for more than 18 months, the law would not permit the doctrine of *res judicata* to apply to this situation.

More directly, the *underlining crux of the issue* is this: The Court of Appeals' reliance on whether Petitioners Patricia, John F. and Frank E. Konarski have a "right" to Section 8 or not does not have any

relevance as to whether the Code of Federal Regulations applies to them. There is nothing in the Code that permits City Respondents to treat them the way they did *without* first finding unsafe or unsanitary apartments during apartment-move-in inspections for new Section 8 tenancies; City Respondents have refused to conduct these move-in inspections after numerous prospective Section 8 tenants have applied to rent from them. City Respondents, in effect, have persistently defied, with impunity thus far, their administrative obligations and the fulfillment of following the Code of Federal Regulations.

The Code of Federal Regulations not only applies to those who have "rights" to participate in a government program, but also to those who want to participate in government programs; it is the framework that dictates the way a government agent is to act when dealing with those seeking government contracts. Hence, there is no "dependence" on any "right" that bars application of 24 C.F.R. 24.610, et seq., to any person or entity; this code dictates governmental acts to the public *regardless* of any perceived "right."

Accordingly, no property owner in the United States has the "right" to participate in the Section 8 Housing program, according to the Court of Appeals. Given this legal fact, the property owners *still* have the protections found under 24 C.F.R. 24.610, et seq., otherwise why would there be any reference to a quasi due process procedure found under 24 C.F.R. 24.760?

The real question is not whether Petitioners Patricia, John F. and Frank E. Konarski have the "right" to participate in Section 8—since that has

been decided for all—but rather whether they (and others) have a right to have the protections found under the Code of Federal Regulations apply to them equally as any other property owner who has no right to Section 8 participation either.

In other words, the Court of Appeals provides no cited authority for the premise that just because Petitioners Patricia, John F. and Frank E. Konarski do not have the "right" to participate in Section 8, they have no right to have the protections accorded to all those who want to participate in Section 8 as found in the Code of Federal Regulations.

In summation, the instant Section 8 Case pending is to establish whether the City of Tucson violated the Code of Federal Regulations proscribing the elimination of property owners/landlords for *more* than 18 months. Without a doubt, due process protections being an inherent part of the Code of Federal Regulations that controls the Section 8 Housing program is an issue that could not have been raised nor was it decided by the Court of Appeals' reference to the 2001 Title VII suit of Frank J. Konarski, and it generally remains an issue that is in stark conflict with the jurisprudence of other courts that deserves to be uniformly decided by this Court.

STATEMENT OF THE PUBLIC CORRUPTION WHISTLEBLOWER CASE

The Whistleblower Case involves an extraordinarily methodical and systematic clandestine public corruption scheme, as recently revealed by government whistleblowers, aimed at causing multi-faceted harm and destroying

Petitioners—a family and their interstate commerce business.

While Petitioners believe that the Whistleblower Case does not bear the necessary elements that would cause it to be barred from prosecution on the basis of *res judicata,* given the nature of this case—that Petitioners had only recently discovered concrete facts that these City Respondents had kept secreted away: the conspiracy to use municipal authority to destroy Petitioners' apartment rental business—even if the Court were to find "privity" between City Respondents and the defendants of the previous case against the City of Tucson, denying Petitioners the ability to adequately prosecute these allegations now for action that occurred prior to April 2005, but only recently discovered would be an injustice, one that this Court should take exception to and should consider as part of what is today's certain instances that are deemed sufficiently gross to demand a departure from rigid adherence to the doctrine of *res judicata.*

A. Case Facts

The Whistleblower Case encompasses City of Tucson employees of 2002 and on who came forward in 2005 to admit, as whistleblowers, that they were ordered by high-directorate City Respondents to harm Petitioners Frank J., Gabriela, Patricia, John F. and Frank E. Konarski and their business through a systematic and methodical public corruption campaign to run them out of business.

City Respondents had the District Court dismiss the Whistleblower Case on *res judicata,* which the Court of Appeals upheld, despite the maintained fact that the Whistleblower Case did not meet the criteria of *res judicata.*

The crux of the appeal issue before this Court is that even if, *assuming arguendo,* the rigid form of *res judicata* did, in fact, bar the Whistleblower Case, as the District Court and Court of Appeals believed it did, it was not proper for the District Court to have dismissed, and for the Court of Appeals to have affirmed such a dismissal of, the Whistleblower Case instead of allowing it to be remanded to meet the justice-wielding body of a jury because said case arose out of noteworthy egregious injustices Petitioners have suffered as a result of a whistleblower-revealed extraordinarily methodical and systematic public corruption scheme aimed at destroying a family and their business that should be considered as part of what is today's certain instances that are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of *res judicata.* This issue was raised in Petitioners' response to City Respondents' motion to dismiss, at pages 12-13, filed on December 8, 2006, to wit: "In fact, the Supreme Court of the United States held that: '...injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the [doctrine of *res judicata*]...' (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)) should result in the [Petitioners] being able to maintain their claim against these specific Defendants, for activity just recently discovered." *See also Charter Twp. of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002). City Respondents had expended, at their disposal, virtually unlimited public funds and resources to secretly protect their personal interests and continue their corruption unhindered until the whistleblowers came to light just recently, for which

Petitioners should not have been penalized.

In spite of the above response and relief sought, the District Court, in its May 2, 2007 order, granted City Respondents' motion to dismiss.

As part of seeking relief from the dismissal order, as an alternative to their appellate arguments, Petitioners still sought the Court of Appeals to depart from the rigid adherence to the doctrine of *res judicata*, given the egregious public corruption that was at the center of the Whistleblower Case, as Petitioners noted in their Opening Brief, at page12, to wit: "Plaintiffs [Petitioners] readily admit that they were substantially the same group that brought forth a claim in 2001, but only one of the defendants [City Respondents] named in 2001 is any one of Defendants [City Respondents] named in the 2006 suit: Adolf Valfre. Hence, there is scant 'privity of parties,' and as a result to this new action, the District Court should not have estopped Plaintiffs [Petitioners] under the doctrine of *res judicata*."

The Court of Appeals' Opinion in the Whistleblower Case never acknowledged the fact that in the cause of action that arose from the incident just prior to 1998—the first suit Petitioners filed after Frank J. Konarski was adjudged by both a trial judge and appellate judge of having been beaten and arrested *without* probable cause—bears no resemblance to the current whistleblower cause of action that occurred in 2002 and thereafter.

Unquestionably, Petitioners sued the City of Tucson in 1998 for a matter that happened just before the time of 1998, and then they sued City Respondents again in 2006 for a matter that happened in 2002 and other whistleblower-revealed tortious pratices thereafter, of which were *discovered*

in 2005 through whistleblowers. In fact, the whistleblowers who had come to commit the transgressions against Petitioners had come to work for City Respondents' main culprit department, the Department of Neighborhood Resources, that was first established in April 2002, four years after the so-called 1998 case and one year after the so-called 2001 case the Court of Appeals erroneously concluded as barring litigation of events transpiring after 2002.

Empirically, it is not legally possible for the District Court nor Court of Appeals to consider a 1998 cause of action of a no-probable-cause "police brutality," and a 2002 cause of action for fabricating bogus charges and other tortious conduct as one in the same for the purpose of *res judicata*; it simply cannot be reconciled that the two are the same action under the same litigation.

Instead of distinguishing the Whistleblower Case apart from the incident just prior to 1998, the Court of Appeals incorrectly implies that it is based "as a result of the incident." App. 2. The Court of Appeals' Opinion mistakenly goes out further on a limb to make an all-inclusive disposition that while the claims of the Whistleblower Case "are not directly controlled by the prior judgment holding that they have no right to participate in the Section 8 program, the claims are barred because they could have been raised in the prior action." *Id.* at 4. Petitioners retort: How could the Whistleblower Case claims be raised in the prior action of 1998 or 2001 if the Whistleblower Case is based on misconduct discovered in 2005 based on a cause of action alleged in 2002, more than four years later than the 1998 cause of action and a year later than the 2001 cause

of action? Reading the Opinion as it is, especially the foregoing excerpts of it, makes one realize that the Court of Appeals erroneously did not appreciate the critical knowledge of what the Whistleblower Case actually entails because nowhere in the 4-page Opinion does the Court of Appeals refer to the post-2001 misconduct.

B. Federal Jurisdiction in the Court of First Instance

The court of original instance, District Court, had jurisdiction under 28 U.S.C. § 1331.

C. Reasons for Granting Petition

I. The Court of Appeals' Opinion Fully Resolved an Issue, Which is Appropriate for Certiorari, and Its Resolution is Inconsistent With Decisions of This Court and Other Circuit Courts

It is in the light of eye-opening, egregious public corruption aimed at destroying Petitioners—a hardworking family and their business livelihood to which they devoted 35 years of their lives—that this Court should consider the Whistleblower Case as one of today's instances in which justice requires that the Court "depart[ ]" from the "rigid adherence to the doctrine of *res judicata*" so that the case can moved forward. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). The District Court and Court of Appeals failed to provide such relief.

The Whistleblower Case was prompted by and revolves around at least four (4) whistleblowers who became the henchmen of high-directorate officials of the City of Tucson—known herein as City Respondents, who ordered them and others to carry out a systematic and methodical campaign to hurt, harass, and violate the rights of Petitioners and

ultimately attempt to run them out of their interstate commerce business. This includes the following: falsifying police reports and charges in 2002 and the subsequent extortion of money; pursuing frivolous and vexatious requirements of Petitioners to progressively hinder the management and commerce of their business; attempting to deprive Petitioners' use of their property; and utilizing inspectors of the Department of Neighborhood Resources to hinder Petitioners' profession and systematically rob them of their real estate and livelihood. The Court of Appeals' Opinion is devoid of the foregoing description of the nature of this egregious public corruption matter.

The damning transcribed admissions of the whistleblowers' egregious systematic and methodical orders made by high-directorate City Respondents to attack Petitioners (Konarskis) and their business that make up the claims of the Whistleblower Case (and are a part of district court record), provide an alarming glimpse of the systematic and methodical public corruption Petitioners had to endure, including the following:

> Whistleblower: They [city officials] have had logistical meetings to specifically go after who they want. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 27, lines 11-12; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: What they wanted to do was put them (Konarski) out of business. (Court Reporter Transcript of Whistleblower Robert and Brian Hendricks, May 9, 2005, at 3, lines 17-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: These people [city officials] are bad.... I do know he [city official] tried to condemn some property that your dad [Frank J. Konarski] now owns....And his idea was that he was going to take the property. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 7, line 1, lines 12-14, lines 18-19; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: I used to work for Ceci Cruz and Rick Saldate [city officials], and they would send us out there on occasion to harass them [Konarskis]. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May

9, 2005, at 3, lines 10-12; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: Rick Saldate and Cecilia Cruz [city officials] are aware that what they're asking for is illegal, but they're also aware that most people won't fight. They go after the poor people first. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 12, lines 21-24; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: The Konarskis was one of their main targets. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 4, lines 6-7; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They just had a personal vendetta against them [Konarski], it

seemed to me.
/..../
I know that Rick and his father [city officials] own a lot of rental properties, maybe they were trying to get it...I just know they had a personal vendetta against the Konarskis. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 6, lines 1-2 and lines 8-11; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] were forcing me to do things I didn't want. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 14, lines 23-24; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Interviewer: Okay. Did he [Frank J. Konarski] ever touch you?

Whistleblower: No, he never touched me....
/..../
Whistleblower: I didn't want to pursue any charges, and they chased me

down for a good two weeks. 'You've got to do this. You've got to do this....

/..../

....She [Cecilia Cruz, city official] pushed the hell out of that shit. She even escorted me to the City Attorney's Office. She helped me – she didn't help me – she prepared everything.

/..../

'This is what you've got to tie in. This is what we want to do.' Blah, blah, blah. I felt bad. Then one day, I'm getting a phone call that says, 'Jess, will you drop these charges? We're going to give you 500 bucks.' If I can make this guy go away, and get rid of Ceci, I'll take 50 dollars, I told him. (Court Reporter Transcript of Whistleblower Jess Craig, April 19, 2005, at 13, lines 5-7; at 16, lines 10-12, 20-23; at 17, lines 1-6; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] would go into the computer and they would change—they would change stuff inside the computer.

/..../

...[T]hey would go in there and change our stuff to make it—to benefit their fitting. (Court Reporter Transcript of Whistleblowers Robert and Brian Hendricks, May 9, 2005, at 20, lines 9-11 and 17-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Interviewer: Were the Konarskis one of those people on that list?

Whistleblower: The Konarskis were one of those people. I was also told by one of the inspectors that they sat outside one of Mr. Konarski's properties yelling at the person inside that he was a wimp, or a pussy, and that he needed to get out there....(Court Reporter Transcript ofWhistleblower Lee Ray Hanley, April 14, 2005, at 15, lines 12-18; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: They [city officials] wanted to hit Frank harder. Harder. (Court Reporter Transcript of

Whistleblower Jess Craig, April 19, 2005, at 6, lines 20-21; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: You have to write up things, contort, twist. (Court Reporter Transcript of Whistleblower Jess Craig,April 19,2005,at 9, line10; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

Whistleblower: I've been telling the [City] lawyers for years. I've been going, you guys are going to get screwed one of these days because what you're doing is not legal. (Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 23, line 1, lines 12-15; due to lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.)

The Whistleblower Case should not be short-circuited to allow the above ugly head of corruption aimed at destroying a family and their interstate commerce

business—Petitioners—to go about its way without the imposition of accountability. Given the above, contrary to the Opinion, "the City of Tucson's decision not to enter into...contracts" is shown as not being the basis of the Whistleblower Case, to say the least. App. 2.

The Whistleblower Case arises out of extraordinary injustices Petitioners had to suffer as a result of egregious misconduct from, ironically, public entities—public officials who were supposed to serve a government structure intended to, if anything, help Petitioners and their business, and certainly not act under the guise of a governmental entity, as they did—having secretive "logistical meetings to specifically go after who they want"—to deliberately attempt to completely destroy Petitioners and rob them of their livelihood for their corrupt motives and gains. Court Reporter Transcript of Whistleblower Lee Ray Hanley, April 6, 2005, at 27, lines 11-12. (Due to its lengthy size, such a transcript is available from the district court record or 9th Circuit Court record, or can be requested from Petitioners.) It would be "manifestly unconscionable" for the corrupt public officials, identified as City Respondents herein, to be able to escape accountability for their gross tortious and criminal actions against Petitioners by this Court's maintaining the rigid *res-judicata* bar merely because City Respondents were able to utilize government resources to conceal their corrupt activities for some time. *Hazel-Atlas Glass Co., supra* (citing *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)).

CONCLUSION

On the basis of the foregoing, it is respectfully urged and prayed for that this Court grant the writ of certiorari herein to United States Court of Appeals for the Ninth Circuit, and that it ultimately reverse the Court of Appeals Opinion and remand both the Section 8 Case and Whistleblower Case back to the District Court for further litigation, with the following opinion, along with any further relief deemed appropriate for the behalf of Petitioners:

In the Section 8 Case, in an effort to unify the diverging legal holdings among the circuits as described above, like any property owner, Petitioners Patricia, John F. and Frank E. Konarski do have the "right" to the protections found in the Code of Federal Regulations independent of a "non-existent" "right" of any property owner to participate in the Section 8 Housing program; the Court of Appeals' reliance that the two be necessarily intertwined is unsupported by any authority.

In keeping with the jurisprudence that "'certain instances...demand a departure' from rigid adherence to the doctrine of *res judicata*," the Whistleblower Case of Petitioners must be permitted to proceed on the path to a jury trial so that it may be tried on its merits in order for justice to prevail. *Hazel-Atlas Glass Co., supra.*

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RESPECTFULLY SIGNED this 3rd day of March 2009.

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He took our money and deceived us, and passed away.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA KONARSKI; et al., Plaintiffs-Appellants, v. CITY OF TUCSON; et al., Defendants-Appellees.	No. 06-17139 D.C. No. CV-04-00260-FRZ MEMORANDUM*

FRANK KONARSKI, Individually as husband, and as owner of FGPJ apartments; et al., Plaintiffs-Appellants, v. MARY JEAN RACITI, as City of Tuscon senior city attorney and individually; et al., Defendants-Appellees.	No. 07-16062 D.C. No. CV-06-00177-RCC

(Filed Aug. 18, 2008)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Argued and submitted August 13, 2008**
San Francisco, California

Before: SILER,*** MCKEOWN, and CALLAHAN, Circuit Judges.

Frank Konarski and his children appeal from the district court's dismissals of two of their actions seeking relief from the City of Tucson's decision not to enter into any new contracts with them under Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437, *et seq*. We agree with the district court that the two suits were barred by *res judicata*, and affirm.

Sometime prior to 1998, Frank Konarski had one or more disputes that apparently had racial overtones with tenants of his apartment structure and that led the Tucson Community Service Department to decline to enter into any new Section 8 contracts with him.[1] The Konarskis brought several lawsuits as a result of the incident and the decision not to enter into any new contracts. Most relevant for these

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** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] Because the parties are familiar with the facts and procedural history, we do not restate them here except as necessary to explain our disposition.

appeals was *Konarski v. Gaffney, et al.*, which became District of Arizona Civ. No. 01-503 TUC DCB.[2] In that case, the district court determined that the plaintiffs had "no right to participate in the Section 8 program." The district court's decision was affirmed by the Ninth Circuit. *Konarski v. Valfire,* 67 Fed.Appx. 458 (9th Cir. 2003).

In these appeals, the Konarskis assert that their complaints are not barred by *res judicata* because there is neither privity between the parties nor identity of claims. A subsequent complaint is barred by *res judicata* where there are "(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties." *Hells Canyon Preservation Council v. U.S. Forest Serv.*, 403 F.3d 683, 686 (9th Cir. 2005). All parties agree that there are final judgments in the Konarskis' prior actions.

There is privity in these cases because each current defendant is a government or government employee who is "so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *In re Schimmels,* 127 F.3d 875, 881 (9th Cir. 1997); *see also Sunshine Anthracite Coal Co. v. Adkins,* 310

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[2] This lawsuit was filed in the United States District Court for the District of Columbia as Case No. 1:01CV00975, and was subsequently transferred to the United States District Court for Arizona.

U.S. 381, 402-03 (1940) (holding that there is privity between officers of the same government).[3]

Furthermore, to the extent that the Konarskis' current claims are not directly controlled by the prior judgment holding that they have no right to participate in the Section 8 program, the claims are barred because they could have been raised in the prior action. *Allen v. McCurry,* 449 U.S. 90, 94 (1980) (holding that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action"). The Konarskis' assertion that they could only be suspended from the Section 8 program for 18 months is dependent upon their having a right to participate in the program, but that issue has been finally resolved against them.

Finally, we agree with, and reiterate, the district court's warning when it denied defendants' request for sanctions that "[s]hould the Plaintiffs continue to file the same claims, which have been ruled upon by three District Court Judges" – and now at least twice by this court – "the Court will consider sanctions."

For the forgoing reasons, the district court's dismissals of these two actions are **AFFIRMED**.

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[3] Frank Konarski's children, plaintiffs in District Court No. CV-04-00260-FRZ, admit in their brief that they were "a part of the group of plaintiffs that brought forth a claim in 2001."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Patricia Konarski, John F. Konarski and Frank Edward Konarski (Jr.), Plaintiffs, vs. City of Tucson; Julianne Hughes, City of Tucson Assistant Attorney; Emily Nottingham, City of Tucson Community Services Director; Peggy Morales, City of Tucson Housing & Administrator; United States Department of Housing & Urban Development (HUD), Defendants.	No. CV 04-260-TUC-FRZ **ORDER** (Filed Sept. 29, 2006)

Factual and Procedural Background

This action commenced with the filing of the Complaint *pro se* on May 17, 2004, alleging claims for violations of civil rights under Title 42 U.S.C. §§ 1982 and 1988. In response, the City of Tucson Defendants filed a Motion to Dismiss pursuant to Rule 12(b)(b) of the Federal Rules of Civil Procedure, seeking to dismiss this action for failure to state a claim upon which relief can be granted.

The Court issued its Order on September 26, 2005, granting Defendants' Motion to Dismiss without prejudice and further granting Plaintiffs leave to file an amended complaint, finding that Plaintiffs failed to meet the general pleading requirements under Rule 8 of the Federal Rules of Civil Procedure and failed to allege proper standing and jurisdiction. Accordingly, the Court found that Plaintiffs' Complaint failed to allege a claim upon which relief can be granted. The Court also found that Plaintiffs' claims appeared to be barred by *res judicata*.

Plaintiffs filed their amended Complaint on October 26, 2005, alleging four separate causes of action. The first cause of action alleges breach of contract. The second cause of action alleges that Defendants acted in an arbitrary and capricious manner. The third cause of action alleges a violation of the United States Department of Housing and Urban Development ("HUD") regulations governing suspensions. The fourth cause of action alleges that the Secretary of HUD has "violated congressional declaration of national housing policy."

Filed in response to the amended Complaint and before the Court for consideration are Secretary Alphonso Jackson's Motion to Dismiss and a Motion to Dismiss by Defendants City of Tucson and the individually named City of Tucson employee Defendants (hereinafter "City Defendants").

Legal Standard

Defendant Alphonso Jackson, Secretary of the United States Department of Housing and Urban Development (hereinafter "HUD"), and the City Defendants move to dismiss Plaintiffs' amended Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), FED.R.CIV.P.

In reviewing a motion to dismiss a complaint under Rule 12(b)(6), the Court must take all well-pleaded allegations of material fact as true and construe them in the light most favorable to the plaintiff. *Manshardt v. Federal Judicial Qualifications Committee,* 408 F.3d 1154, 1156 (9th Cir.2005) (*citing Gompper v. VISX, Inc.,* 298 F.3d 893, 895 (9th Cir.2002); see also *Zimmerman v. City of Oakland,* 255 F.3d 734, 737 (9th Cir.2001). Dismissal is proper under Rule 12(b)(6) if it appears beyond doubt that the plaintiff can prove no set of facts to support his claims. *Id.* (*citing Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir.2004)).

Based on the foregoing standard, the Court finds dismissal proper under Rule 12(b)(6).

Discussion

I. Secretary Alphonso Jackson's Motion to Dismiss

Defendant Jackson, sued only in his official capacity, moves to dismiss the amended Complaint

against HUD based on the contention that this action involves a dispute between the City of Tucson and the Plaintiffs, and that Plaintiffs have failed to state a claim to show that there was a breach of contract involving HUD; that there was no arbitrary or capricious actions taken by HUD; there was no regulatory violation under 24 C.F.R. § 24.760(b) by HUD, and there is no separate private cause of action against HUD for violation of congressional policy.

HUD's motion provides a thorough analysis of the relevant provisions of 42 U.S.C. § 1437 and the applicable federal regulations promulgated thereunder by which HUD, through its Section 8 program, provides federal funding to help needy families with housing requirements. Section 8 housing is predominantly and generally administered by state and/or local governmental entities referred to as public housing agencies or "PHAs." See 24 C.F.R. § 982.1(a)(1) and (2).

As HUD contends, this action arises out of a long standing dispute between the Plaintiffs and the City of Tucson. The present focus is that Plaintiffs are the new owners of apartments and, as such, the City of Tucson's continued refusal to allow Plaintiffs to participate in the Section 8 program is improper.

HUD argues that Plaintiffs fail to state a claim on its breach of contract claim because there is "nothing in 42 U.S.C. § 1437f(b)(1) or 24 C.F.R. § 982.455 that supports Plaintiffs' contention that there was a 'contractual agreement' between Defendants and

anybody, much less HUD." HUD emphasizes that "Section . . . 1437(b)(1) merely authorizes the Secretary 'to enter into annual contribution contracts with [PHAs] pursuant to which such agencies may enter into contracts to make assistance payments to owners. . . . '" (footnote omitted)[1]

HUD further argues that Plaintiffs' contentions regarding breach of contract are falsely premised on the allegation that they were contractually entitled to procedures set forth in the applicable regulations.

In regard to Plaintiffs' allegations set forth in their second cause of action under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, as well as the allegations set forth in Plaintiffs' third and fourth causes of action, HUD argues that such fail to state a claim, because 24 C.F.R. § 760(b) has no application and there is no separate private cause of action under 42 U.S.C. § 1441.

In response, Plaintiffs argue that whether HUD "is not responsible for their PHA's action . . . is a question that needs to be determined at trial" and that "[i]f Plaintiffs can prove that there is a 'master and servant' relationship between HUD and their PHA, then there is little doubt that HUD would be as

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[1] Secretary Alphonso Jackson's Motion to Dismiss, page 5.

liable as their PHA for any 'arbitrary and capricious acts' committed by the PHA." (citation omitted).[2]

Plaintiffs fail, however, to present any authority to support their contentions and interpretation of the statutory and regulatory language relied upon.

II. City of Tucson Defendants' Motion to Dismiss

The City of Tucson Defendants move to dismiss the amended Complaint on the basis Plaintiffs previously litigated the issues raised and there are no set of facts that would entitle them to relief.

The City Defendants argue that Plaintiffs "seek, by way of their complaint, to resurrect the same claim raised by these same plaintiffs in a lawsuit filed against Defendants in May 2001,"[3] and reassert that the issues raised in the present action are barred by the doctrines of *res judicata* and collateral estoppel, based on an August 21, 2002 order by the Honorable David C. Bury, granting summary judgment in favor of the defendants in an action brought by the same Plaintiffs now before the Court.

The previous action alleged violations relating to the administration of Section 8 housing, pursuant to the United States Housing Act of 1937, 42 U.S.C.

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[2] Comprehensive Response to Both Motions to Dismiss, page 2.

[3] Motion to Dismiss, page 2.

§ 1437f and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000, *et seq.* Judge Bury found that Plaintiffs had no property interest to pursue their constitutional claims under the Fifth and Fourteenth Amendments. The court also found that it lacked subject matter jurisdiction over the Title VII claims.

Defendants request that the Court take judicial notice of the record in the underlying action, attaching as exhibits copies of the Court's Order and judgment, and decision of the Court of Appeals for the Ninth Circuit affirming the district court's dismissal. The City Defendants contend that although the allegations of the new complaint differ, the Plaintiffs' demand that the Court order Defendants to reinstate them into the Section 8 program is the same issue that has been litigated in the previous action.

The City Defendants also address each of the causes of action on the merits, setting forth substantiated arguments that there is no breach of contract under 42 U.S.C. § 1437f(b)(1) because there exists no contract between HUD and the Plaintiffs. Defendants further argue that Plaintiffs' reliance on 24 C.F.R. § 24.600 is misplaced.

The City Defendants further support their position that the Public Housing Agency, created pursuant to A.R.S. § 36-1404 is not a federal agency subject to the Administrative Procedure Act, and therefore, Plaintiffs fail to state a claim under their second and third causes of action based on the PHA's decision to no longer contract with the Plaintiffs.

Finally, Defendants argue that Plaintiffs' fourth cause of action presupposes an obligation on the part of the City Defendants to recognize an inherent right to participate in the Section 8 program by the Plaintiffs, which is not established, and that moreover, Plaintiffs have had a full and fair opportunity to litigate this issue, and thus, are now precluded from doing so under the doctrines of judicial and collateral estoppel.

Plaintiffs argue in opposition that the doctrine of *res judicata* does not apply because the claims raised in the present action arise from activity that happened after January 2003, and therefore, "as a matter of course, Plaintiffs could not have previously litigated the issue at the time 01-CV-975 was filed; the issue had not yet become ripe for litigation."[4] Plaintiffs further argue that there can be no claim preclusion, because "Plaintiffs could not see in the future that the Tucson PHA would maintain their sanction for more than 18 months."[5]

Plaintiffs emphasize that under the standard of review, all facts alleged in the amended Complaint must be taken as true, and that Plaintiffs have provided a valid cause of action that needs to be addressed by a competent trier of fact regarding the

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[4] Comprehensive Response to Both Motions to Dismiss, page 6.

[5] Id.

breach of contract claim as well as the claims for violations of federal housing regulations.

III. Analysis

Set forth in the City of Tucson Defendants' Motion to Dismiss is a thorough analysis of *res judicata* and issue preclusion supported by case law.

Secretary Alphonso Jackson's Motion to Dismiss sets forth a thorough analysis and addresses Plaintiffs' causes of action as alleged in the amended Complaint on the merits. The arguments for dismissal are well supported with authority presented.

Plaintiffs oppose the Defendants' motions to dismiss, but do not dispute the legal standards or authority relied upon by the Defendants.

Upon review and consideration of the matters presented, the Court finds that the causes of action raised in the case at bar are precluded by *res judicata*. *See Lanphere Enterprises, Inc. v. Koorknob Enterprises*, 145 Fed. Appx. 589, 590-592 (9th Cir. 2005); *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1173 (9th Cir. 2004); *Littlejohn v. United States*, 321 F.3d 915, 919 (9th Cir. 2003).

Moreover, because it appears beyond doubt that the Plaintiffs can prove no set of facts to support their causes of actions as alleged, and have thus failed to state claims upon which relief can be granted, dismissal of the present action is proper under Rule 12(b)(6). *Adams*, 355 F.3d at 1183.

Based on the foregoing,

IT IS HEREBY ORDERED that Secretary Alphonso Jackson's Motion to Dismiss [Doc. #31] and the Motion to Dismiss [Doc. #32] filed by the City of Tucson Defendants is GRANTED; Judgment shall be entered accordingly.

DATED this 29th day of September, 2006.

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRANK J. KONARSKI and GABRIELA KONARSKI; et al., Plaintiffs, vs. MARY JEAN RICITI; et al., Defendants.	No. CV 06-177-TUC-RCC **ORDER** (Filed May 2, 2007)

Pending before the Court are the Defendants' Motion to Dismiss (Docket No. 55) and Plaintiffs' Motion for Leave to File Amended Complaint (Docket No. 63). The Defendant's request for Oral Argument is denied. The Court has found the Parties' pleadings to be sufficient for rendering a decision on the Motion to Dismiss. Following a careful review of the Defendants' Motion to Dismiss, the Plaintiff's Response and the Defendant's Reply, the Court will grant the Motion to Dismiss and deny the Plaintiff's Motion for Leave to File an Amended Complaint.

This case was filed on April 7, 2006 and the Defendants filed their Motion to Dismiss on October 19, 2006. The Plaintiff initially alleged a Racketeering claim, a Sherman Antitrust claim, a 42 U.S.C. §1985 claim for conspiracy, and a 42 U.S.C. §1983 claim under the Commerce Clause, the Fifth and

Fourteenth Amendments. Once the Motion to Dismiss was filed the Plaintiff admitted in their Response (Docket No. 61) that some of their causes of action are not appropriate and joined with the Defendants in asking that these claims be dismissed. The Plaintiffs admit that the Sherman Antitrust Act claim is invalid, their Commerce Clause claim is without factual support and agree that there is insufficient evidence to support the 42 U.S.C. §1985 claim. The Plaintiffs stand by their initial stance that the Racketeering and 42 U.S.C. §1983 claims are valid.

The Court finds that the Plaintiff's Racketeering claim is legally invalid as plead. According to the F.R.C.P. 9(b) a claim of fraud must be stated with particularity. The Court has held that a detailed explication of the factual underpinnings of a Racketeer Influenced and Corrupt Organizations ("RICO") Act claim is required for the expeditious progress of the litigation, in light of the stigmatizing effect of the quasi-criminal nature of the claims made against the named defendants. *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1108 (9th Cir. 2003). The Plaintiffs have failed to meet this requirement for pleading with particularity, rendering their RICO claims invalid.

The Defendants assert that the issues raised by the Plaintiffs are barred by the doctrine of *res judicata* based on an August 21, 2002 order in civil case number 01-503, by the Honorable David C. Bury, granting summary judgment in favor of the defendants in an action brought by the same Plaintiffs now before the Court, alleging violations relating to the

administration of Section 8 housing program of the Department of Housing and Urban Development. In its order of August 21, 2002, the Court found that the Plaintiffs have no protected interest in pursuing their constitutional claims under the Fifth and Fourteenth Amendments. These same Plaintiffs filed a complaint on May 17, 2004, which was Dismissed by the Honorable Frank R. Zapata based on the doctrine of *res judicata* in a September 29, 2006 order in civil case 04-260.

The Plaintiffs' Request for Leave to File an Amended Complaint is denied because their claims are precluded by the doctrine of *res judicata*. *Res Judicata* precludes the parties, and their privies, from relitigating issues that were, or that could have been, raised in a previous action where a final judgment on the merits was reached. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Court does not agree with the Plaintiffs' claim that no privity exists between the parties in civil cases 01-503 and 04-260.

In Case 01-503 the defendants included the City of Tucson City Manager, the Administrator of Housing Assistance Programs and Community Service Department Section 8 Housing, and the Inspector General of the U.S. Department of Housing and Urban Development. In Case 04-260 the defendants included the City of Tucson, the Assistant Attorney to the City of Tucson, the City of Tucson Community Services Director and the U.S. Department of Housing and Urban Development. In the case before the Court today the Defendants include two Tucson City

Attorneys, five employees of the City of Tucson Department of Neighborhood Resources, an employee of the City of Tucson Community Services Department, an employee of the City of Tucson Section 8 Housing Program, the City of Tucson Office of the City Attorney, the Department of Neighborhood Resources and the City of Tucson.

Privity "involves a person so identified in interest with another that he represents the same legal right." *Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers Inc.,* 102 Cal. App. 4th 765, 772 (Cal. Ct. App. 2002). The Court finds that "there is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government." *Sunshine Anthracite Coal Co. v. Adkins,* 310 U.S. 381, 402-403 (1940). It is clear to the Court that the current Defendants, as employees of the City of Tucson, or its subdivisions related to the Section 8 program, are clearly identified with the interests of the defendants named in both civil cases 01-503 and 04-260.

The Defendants' Motion to Dismiss included a request for sanctions, which the Court will deny at this time. Should the Plaintiffs continue to file the same claims, which have been ruled upon by three District Court Judges, the Court will consider sanctions.

Based on the foregoing,

IT IS HEREBY ORDERED that the Defendants' Motion to Dismiss is GRANTED with prejudice;

IT IS FURTHER ORDERED that the Plaintiff's Motion for Leave to File Amended Complaint is DENIED,

IT IS FURTHER ORDERED that the Defendants' Request for Sanctions is DENIED.

DATED this 1st day of May, 2007.

/s/ Raner C. Collins
Raner C. Collins
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA KONARSKI; et al., Plaintiffs-Appellants, v. CITY OF TUCSON; et al., Defendants-Appellees.	No. 06-17139 D.C. No. CV-04-00260-FRZ District of Arizona, Tucson ORDER
FRANK KONARSKI, Individually as husband, and as owner of FGPJ apartments; et al., Plaintiffs-Appellants, v. MARY JEAN RACITI, as City of Tuscon senior city attorney and individually; et al., Defendants-Appellees.	No. 07-16062 D.C. No. CV-06-00177-RCC District of Arizona, Tucson ORDER (Filed Oct. 2, 2008)

Before: SILER,* McKEOWN, and CALLAHAN, Circuit Judges.

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* The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

Footnote ** in the memorandum disposition filed on August 18, 2008, is deleted. With this deletion, the panel denies the petition for rehearing.

Judges McKeown and Callahan have voted to deny the petition for rehearing en banc and Judge Siler so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.610]

[Page 261]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart F_General Principles Relating to Suspension and Debarment Actions

Sec. 24.610 What procedures does the Department of Housing and Urban Development use in suspension and debarment actions?

In deciding whether to suspend or debar you, we handle the actions as informally as practicable, consistent with principles of fundamental fairness.

(a) For suspension actions, we use the procedures in this subpart and subpart G of this part.

(b) For debarment actions, we use the procedures in this subpart and subpart H of this part.

APPENDIX F

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.700]

[Page 263]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart G_Suspension

Sec. 24.700 When may the suspending official issue a suspension?

Suspension is a serious action. Using the procedures of this subpart and subpart F of this part, the suspending official may impose suspension only when that official determines that –

(a) There exists an indictment for, or other adequate evidence to suspect, an offense listed under Sec. 24.800(a), or

(b) There exists adequate evidence to suspect any other cause for debarment listed under Sec. 24.800(b) through (d); and

(c) Immediate action is necessary to protect the public interest.

APPENDIX G

[Code of Federal Regulations]
[Title 24, Volume 1]
[Revised as of January 1, 2007]
From the U.S. Government Printing Office
via GPO Access
[CITE: 24CFR24.760]

[Page 265]

TITLE 24 – HOUSING AND URBAN DEVELOPMENT

PART 24_GOVERNMENTWIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT) –

Subpart G_Suspension

Sec. 24.760 How long may my suspension last?

(a) If legal or debarment proceedings are initiated at the time of, or during your suspension, the suspension may continue until the conclusion of those proceedings. However, if proceedings are not initiated, a suspension may not exceed 12 months.

(b) The suspending official may extend the 12 month limit under paragraph (a) of this section for an additional 6 months if an office of a U.S. Assistant Attorney General, U.S. Attorney, or other responsible prosecuting official requests an extension in writing. In no event may a suspension exceed 18 months without initiating proceedings under paragraph (a) of this section.

(c) The suspending official must notify the appropriate officials under paragraph (b) of this

section of an impending termination of a suspension at least 30 days before the 12 month period expires to allow the officials an opportunity to request an extension.